# *United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*

WT/DS236

**Answers of the United States of America**
**to the Panel's 26 April 2002 Questions**

**May 8, 2002**

UNITED STATES - PRELIMINARY DETERMINATIONS
WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA

QUESTIONS BY THE PANEL

Questions to the United States

**1. What information did the USDOC have on the record with regard to the rights and obligations of stumpage tenure holders in Canada, in particular with regard to the existence or not of a requirement to enter into agreements with sawmills in Canada? Please provide the information of record, including DOC's calculation worksheets, which shows the valuation of the obligations undertaken by the tenure holders.**

Answer:

1. At the time of the Preliminary Determination, the U.S. Department of Commerce ("Commerce Department") had extensive evidence on the record indicating that the vast majority of government timber in Canada was provided directly to tenure holders that owned sawmills or other wood processing facilities.[1] Specifically, the laws and regulations of each Canadian province (with the partial exception of Ontario, discussed below) generally require that tenure holders be sawmills. The evidence described below for each province consisted primarily of provincial legislation, sample tenure contracts and statistical data provided by the provincial governments in response to the Commerce Department's questionnaires.

2. British Columbia: The Government of British Columbia ("B.C.") provided the Commerce Department with the volume of softwood harvest going to holders of each of the eleven types of Crown tenures as well as the laws, regulations and license templates governing each of the principal tenure types.[2] More than 83 percent of the B.C. Crown softwood timber harvest is provided to holders of four types of B.C. tenures These four types of B.C. tenures and their corresponding percentage of the B.C. Crown softwood timber harvest are listed below:

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[1] As the United States explained in its oral statement, some wood processing facilities, such as plywood mills, produce forest products that are not within the scope of the underlying investigation. *See* U.S. First Oral Statement, para. 28. The Commerce Department did not include timber that goes to such facilities in the calculation of the total subsidy. Therefore, data on the proportion of the harvest that goes to *all* entities that own and operate a wood processing facility is irrelevant. Thus, for purposes of this discussion we will subsequently refer only to sawmills.

[2] Questionnaire Response of the Government of British Columbia, vol. 3, Exhibit BC-S-1, Attachment E-1 (June 28, 2001) ("B.C. June 28 Response") (Exhibit U.S.-17).

- *Forest Licenses*[3] – 57 percent of total harvest
- *Tree Farm Licenses*[4] – 18 percent of total harvest
- *Small Business Forest Enterprise Program ("SBFEP") Section 21*[5] – 5 percent of total harvest
- *Timber License Within a Tree Farm License*[6] – 3 percent of total harvest

Each of these tenures *requires* the tenure holder to own a processing facility (for these purposes, a sawmill) and process the harvested timber (or an equivalent volume) in its own mill.[7] For example, the sample Tree Farm License on the record states:

> The Licensee will process all timber harvested under a cutting permit or road permit, or equivalent volumes of timber or wood residue excluding hog fuel, obtained directly or indirectly, **through a timber processing facility owned or operated by the Licensee or an affiliate of the Licensee** within the meaning of Section 53(1) of the *Forest Act,* unless the Minister exempts the Licensee in whole or in part from the requirements of this paragraph.[8]

Similarly, the sample Forest License on the record states:

> The Licensee must process all timber harvested under this License or a road permit, or equivalent volumes, through a timber processing facility

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[3] *See* B.C. Forest Act § 14(f)(i), contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-36 (Exhibit U.S.-17); Template Forest License § 14.01, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-63 (Exhibit U.S.-17).

[4] *See* B.C. Forest Act § 35, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-36 (Exhibit U.S.-17); Template Tree Farm License § 15, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-62 (Exhibit U.S.-17).

[5] *See* Small Business Forest Enterprise Regulation §§ 4, 4.1, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-71 (Exhibit U.S.-18); Application and Tender for Timber Sale License (Section 21) para. 8, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-60 (Exhibit U.S.-19); B.C. Ministry of Forests, Forest Policy Manual § 14.1, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-70 (Exhibit U.S.-20).

[6] *See* Sample Timber License § 1.01(a), contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-66 (Exhibit U.S.-21).

[7] By requiring that an "equivalent volume" of timber be processed by the tenure holder, the provinces permit tenure holders to "trade" or "swap" logs with other tenure holders to meet specific production needs.

[8] Template Tree Farm License § 15.01, contained in B.C. June 28 Response, at vol. 9, Exhibit BC-S-62 (emphasis added) (Exhibit U.S.-17).

(a) **owned or operated by the Licensee or an affiliate of the Licensee** within the meaning of section 53 of the *Forest Act.*[9]

3. The remaining B.C. Crown timber is provided under licenses that are normally reserved (with some case-by-case exceptions) to entities not owning timber processing facilities. These include SBFEP Section 20 licenses (7 percent of harvest) and woodlot licenses (2 percent). However, the B.C. Forest Act requires that all timber harvested from Crown lands be processed in B.C.[10] In addition, other legal restrictions apply to these forms of B.C. tenure, such as minimum cut requirements and bidding restrictions.[11] As discussed in response to question 8 to Canada, these legal restrictions indicate that transactions for the timber covered by these tenures is not at arm's-length. Moreover, as the B.C. government stated: "[f]or the most part, loggers operate as employees or contractors for holders of private lands or Crown tenures."[12] The alleged "independent logger" is therefore largely a myth.

4. Quebec: The record evidence demonstrates that the Government of Quebec ensures that only sawmills are permitted to harvest the vast majority of Quebec Crown softwood timber. For example, section 37 of the Quebec Forest Act states that "[n]o one except a person authorized under Title IV to construct or operate a wood processing plant is qualified to enter into" a Timber Supply and Forest Management Agreement ("TSFMA"), the virtually exclusive form of tenure in Quebec (covering 99 percent of the Crown harvest).[13] Section 42 of the Forest Act also states that the TSFMA holder is entitled to "harvest a volume of round timber of one or several species to supply *his* wood processing plant . . . ."[14] The sample TSFMA provided by Quebec similarly states that the license holder is granted authority to harvest "for the purpose of supplying its plant," and that the tenure holder is required to "process all wood harvested under its forest

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[9] *Id.* § 14.01, contained in B.C. June 28 Response, at vol. 9, Exhibit BC-S-63 (emphasis added) (Exhibit U.S.-17).

[10] *See* B.C. Forest Act, Part 10 § 127, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-36 (Exhibit U.S.-17).

[11] Licenses are available only to small business operators.

[12] B.C. June 28 Response, at vol. 15, page BC-LER-45 (Exhibit U.S.-36).

[13] *See* Quebec Forest Act § 37, contained in Questionnaire Response of the Government of Quebec, vol. 4, Exhibit QC-S-16 (June 28, 2001) ("GOQ June 28 Response") (Exhibit U.S.-22). In addition, section 159 of the Forest Act states that "all timber harvested in the public domain, whatever the nature or object of the management permit authorizing the harvesting, must be completely processed in Quebec." *See* Quebec Forest Act § 159, contained in GOQ June 28 Response, at vol. 4, Exhibit QC-S-16 (Exhibit U.S.-22).

[14] *See* Quebec Forest Act § 42 (emphasis added), contained in GOQ June 28 Response, at vol. 4, Exhibit QC-S-16 (Exhibit U.S.-22).

management permit with a view to using it at the plant identified in the preamble to this Agreement."[15] The construction and operation of mills is also controlled by the Quebec Ministry of Natural Resources.[16]

5. Ontario: In its questionnaire response, the Government of Ontario stated that "[g]enerally, in order to obtain any type of license, an applicant must either own a forest resource processing facility (e.g., a sawmill, pulpmill, veneer mill, etc.) or must have a market to supply wood to some type of forest resource processing facility."[17] Section 30 of the Crown Forest Sustainability Act also states: "A forest resource license that authorizes the harvesting of trees is subject to the condition that all trees harvested *shall be manufactured in Canada* into lumber, pulp or other products."[18] In addition, Ontario states that the typical license "directs that the forest resources harvested pursuant to that license should be used to supply the forest resource processing facility owned by the license holder identified in the license, as well as other mills with commitments to receive wood from that license area. Some license holders do not own processing facilities, but instead have sales arrangements with other facilities."[19]

6. Alberta: The Government of Alberta provides stumpage under three main tenure arrangements: (1) Forest Management Agreements ("FMA"); (2) Certificate Timber Quotas ("CTQ"); and (3) Commercial Timber Permits ("CTP").[20] In its questionnaire response, Alberta stated that "[a]ll forms of commercial tenure own and operate sawmills."[21]

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[15] TSFMA §§ 1, 6.6, contained in GOQ June 28 Response, at vol. 5, Exhibit QC-S-30 (Exhibit U.S.-22).

[16] Section 162 of the Forest Act states that "[n]o person may construct a wood processing plant of a class prescribed by regulation of the Government, increase the timber consumption capacity of such a plant or change its class or location without prior authorization from the Minister." *See* Quebec Forest Act § 162, contained in GOQ June 28 Response, at vol. 4, Exhibit QC-S-16 (Exhibit U.S.-22).

[17] Questionnaire Response of the Government of Ontario, vol. 1, pages 55-56 (June 28, 2001) ("GOO June 28 Response") (Exhibit U.S.-23). *See also* Crown Forest Sustainability Act §§ 25-27, contained in GOO June 28 Response, at vol. 4, Exhibit ON-GEN-18 (Exhibit U.S.-23). The Crown Forest Sustainability Act provides an exemption for trees that are used *in Canada* in a non-manufactured state for fuel, building or other purposes. *Id.* § 30(2), contained in GOO June 28 Response, at vol. 4, Exhibit ON-GEN-18 (Exhibit U.S.-23).

[18] Crown Forest Sustainability Act § 30(1) (emphasis added), contained in GOO June 28 Response, at vol. 4, Exhibit ON-GEN-18 (Exhibit U.S.-23).

[19] GOO June 28 Response, at vol. 1, page 45 (Exhibit U.S.-23).

[20] Questionnaire Response of the Government of Alberta, vol. 1, pages AB-II-24-28 (June 28, 2001) ("GOA June 28 Response") (Exhibit U.S.-24).

[21] *Id.* at vol. 1, page AB-III-16 (Exhibit U.S.-24).

7. Saskatchewan: In Saskatchewan, 86 percent of softwood sawlogs were harvested by Forest Management Agreement holders, all of whom own sawmills and process their own timber.[22] The remainder of the harvest was provided to smaller licensees under Forest Product Permits ("FPP"), some of whom have their own sawmills. Although there is not an exact measure, more than 86 percent of softwood sawlogs were provided directly to sawmills.

8. Manitoba: In Manitoba, 49 percent of softwood sawlogs were provided to holders of Forest Management Licenses ("FML"), who by law are required to own timber processing facilities.[23] Virtually all of the remaining 51 percent of softwood sawlogs were provided under Timber Sales Agreements ("TSA"). The volume of softwood harvested by TSA holders owning sawmills amounted to 46 percent of the total softwood sawlog harvest.[24] Thus, approximately 95 percent of softwood sawlogs were provided directly to sawmills in Manitoba.

9. Based on this record evidence, the Commerce Department preliminarily concluded that the overwhelming majority of Crown timber is provided directly to sawmills.[25] Moreover, there was significant evidence that most of the small portion of Crown timber harvested by tenure holders that do not own sawmills is subject to restrictions that tie the timber to specific sawmills in Canada. Based on that evidence the Commerce Department preliminarily found that virtually all of the softwood timber entering sawmills is provided directly to the mills by the provincial governments, within the meaning of Article 1.1(a)(1)(iii) of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

10. In contrast, Canada's arguments are not supported by the evidence. Specifically, Canada cites to a request for company exclusions in support of its claim that the evidence showed a

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[22] Questionnaire Response of the Government of Saskatchewan, vol. 2, Exhibit SK-S-6 (June 28, 2001) (Exhibit U.S.-25).

[23] Questionnaire Response of the Government of Manitoba, vol. 1, page 13 (June 28, 2001) ("GOM June 28 Response") (Exhibit U.S.-26); *see also* Supplemental Questionnaire Response of the Government of Manitoba vol. 1, Revised Exhibit MB-S-5 (August 3, 2001) ("GOM August 3 Response") (Exhibit U.S.-26). Section 18 of the Forest Act states that the Minister may grant an FML if an investment in a wood-using industry is established or to be established in the province. *See* GOM June 28 Response, at vol. 2, Exhibit MB-S-13, page 9 (Exhibit U.S.-26).

[24] GOM June 28 Response, at vol. 1, page 18 (Exhibit U.S.-26); GOM August 3 Response, at vol. 1, Revised Exhibit MB-S-5 (Exhibit U.S.-26). In other words, Manitoba stated that there were 278,463 $m^3$ of softwood sawlogs (51 percent of all Crown softwood sawlogs) harvested by TSAs and that 249,080 $m^3$ of softwood was harvested by TSA owners owning sawmills.

[25] To the extent that sawmills contract with loggers, either as employees or as independent contractors, to physically harvest the timber, the loggers do not "receive" the financial contribution, which is provided directly to the mills under the tenure. By way of analogy, the messenger service that delivers a government check to a manufacturer does not "receive" the financial contribution; the manufacturer does. The provincial stumpage systems are no different.

significant amount of harvesting by independent entities operating at arm's-length.[26] However, that submission does not concern harvesting done by independent entities. Rather, it concerns exporters' claims to have received zero or *de minimis* subsidies. Of the 95 companies requesting exclusion, only 8 requested exclusion on the basis of a claim that they purchased logs at arm's-length, a claim that included *related* as well as unrelated suppliers. Moreover, the submission does not contain any information on the volume or value of logs allegedly purchased by the exclusion applicant from independent entities at arm's-length. The very limited claims of arm's-length transactions, in fact, support the Commerce Department's preliminary finding that virtually all of the Crown harvest is provided directly to lumber mills.

11. With respect to the obligations undertaken by the tenure holders, the Commerce Department examined the obligations that tenure holders were legally obligated to assume in Canada and compared them to those assumed by harvesters of the benchmark timber. The Commerce Department calculated a per-unit amount for each category of Canadian obligations that was above and beyond obligations incurred by parties paying stumpage charges in the United States. For purposes of the Preliminary Determination, the Commerce Department used the values for each obligation provided by the Canadian provincial governments in their questionnaire responses. The Commerce Department considered the per-unit cost of these obligations as a form of "in-kind" payment, which it added to the stumpage fee.[27] Sample calculations showing the adjustments for in-kind payments are provided in Exhibit U.S.-28, and the supporting worksheets are provided in Exhibit U.S.-27.

**2. Concerning the US determination of a benefit in the softwood lumber investigation:**

**(a) In the US view, is Article 14(d) of the SCM the relevant paragraph to determine the amount of the benefit in this case?**

Answer:

12. Yes. Article 14(d) of the SCM Agreement sets forth guidelines for determining whether the government has provided a good or service, within the meaning of Article 1.1(a)(1)(iii), for less than adequate remuneration. Based on the arguments presented in the U.S. first written submission, as discussed further at the first substantive meeting with the Panel, there should be

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[26] *See* Canada First Oral Statement, para. 47, fn. 17.

[27] See *Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Certain Softwood Lumber Products From Canada*, 66 Fed. Reg. 43186, 43199-200 (Quebec), 43201-02 (British Columbia), 43204-05 (Ontario), 43206-07 (Alberta), 43208 (Manitoba), 43210 (Saskatchewan) (August 17, 2001) ("*Preliminary Determination*") (Exhibit CDA-1).

no doubt that, through timber tenures, the provincial governments provide a good – timber – to lumber producers. Canada's claims to the contrary are contradicted by ordinary dictionary definitions and Canada's own laws.[28] Nor can there be any doubt that the provinces, through the tenures, make Crown timber available to lumber producers, i.e., the provinces "provide" the timber to the lumber producers.[29]

13. In addition, the record contradicts Canada's claims that the provinces merely tax the lumber producers when they exercise a pre-existing right in the timber. As noted in the amicus curiae submission of the Interior Alliance Indigenous Nations, Canada has always claimed exclusive jurisdiction and ownership over public lands, including Crown forests.[30] Moreover, as Canadian courts have recognized:

> The Crown exerts its financial interest in the forests of the Province through stumpage appraisal, a process which places value on the timber harvested. Stumpage is the price a licensee must pay to the Crown for its timber.[31]

The court ruling is confirmed by record evidence. For example, in Ontario the Crown Forest Sustainability Act states that forest resources harvested under a tenure remain the property of the Crown until all Crown charges have been paid. The Crown Forest Sustainability Act also states that a tenure does not confer on the licensee any interest in land or any right to exclusive possession of land, and that all forest resources renewed in a Crown forest are the property of the Crown.[32] This evidence leaves no doubt that the provinces are selling timber to lumber producers.

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[28] "Goods" is defined as encompassing all "property or possessions" and "saleable commodities." *The New Shorter Oxford English Dictionary* 1116 (1993) (Exhibit CDA-18). *Black's Law Dictionary* also defines "goods" as specifically including "growing crops, and other identified things to be severed from real property." *Black's Law Dictionary* 701-702 (7th ed. 1999) (Exhibit CDA-17). *See also* Sale of Goods Act (British Columbia), RSBC 1996, ch. 410, section 1 ("[G]oods includes . . . growing crops, whether or not industrial, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale.") (Exhibit U.S.-6).

[29] The *New Shorter Oxford English Dictionary* defines "provides" as meaning to "make available" as well as to "supply or furnish for use." *The New Shorter English Dictionary* 2393 (1993) (Exhibit U.S.-5).

[30] Interior Alliance Indigenous Nations Amicus Curiae Submission, page 5.

[31] *Id.* at page 8, citing *British Columbia v. Canadian Forest Products* (8 February 1998), Victoria 972176, [1999] BCJ 335 (B.C.S.C.), affirmed, 2000 BCCA 456.

[32] Crown Forest Sustainability Act §§ 33(1), 36 and 65, contained in GOO June 28 Response, at vol. 4, Exhibit ON-GEN-18 (Exhibit U.S.-23).

14. Because the provincial governments are unquestionably providing a good within the meaning of Article 1.1(a)(1)(iii), Article 14(d) provides the appropriate guidelines for determining the benefit.

**(b) Is it the US argument that Article 14(d) does not restrict the authority to use only market prices of the country under investigation?**

Answer:

15. It is the United States' position that the phrase "in relation to prevailing market conditions for the good . . . in the country of provision" in Article 14(d) does not restrict the authority to using, in every instance, only prices between buyers and sellers in the country under investigation. The concept of commercial availability is expressly incorporated in Article 14(d), which defines "prevailing market conditions for the good" to include, *inter alia*, availability. Prevailing market conditions in the country of provision may therefore encompass prices commercially available on the world market to purchasers in the country under investigation.

16. The flexibility to use commercially available world market prices in Article 14(d) is also reflected in item (d) of the Illustrative List of Export Subsidies in Annex I to the SCM Agreement. Annex I, in part, illustrates how the guidelines in Article 14 may be applied in certain situations. Item (d) of the Illustrative List expressly provides that whether the government's provision of an input confers an advantage to the production of goods for export can be measured by reference to prices for the input "commercially available on world markets."[33] This flexibility to use world market prices was also confirmed by the panel and the Appellate Body in *Canada Dairy*.[34]

17. The use of world market prices commercially available to producers in the country under investigation is therefore not *per se* inconsistent with Article 14(d). Canada has, in fact, conceded that world market prices can constitute an appropriate benchmark in certain situations.[35] An obvious example of when commercially available world market prices may be an appropriate benchmark is where the government is the sole provider of the input in the

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[33] Footnote 57 to the Illustrative List states: "The term 'commercially available' means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations."

[34] *See* U.S. First Written Submission, para. 46; EC Third Party Submission, para. 18.

[35] *See* Canada Case Brief, Vol 2 at B6. Canada conceded that prices of some homogeneous commodity products with negligible transportation and transaction costs may properly be compared to world market prices or to prices in other countries because such a comparison would require only minor cost adjustments. These products obey the so-called "law of one price," which holds that market prices for these goods can be expected to be the same in different geographic areas.

country under investigation.[36] In such a situation, prices commercially available on the world market may be the only logical basis for determining the position the recipient would have been in absent the financial contribution.

18. For the reasons previously discussed, it is the view of the United States that the facts of this case present an analogous situation. Specifically, as discussed below in response to question 3 to the United States, only two provinces provided any information on private stumpage prices, and that limited information was inadequate to serve as a benchmark for those provinces. Moreover, the evidence indicates that the Canadian provincial governments so dominate the market for timber that below-market government prices suppress prices in the small market for private timber in Canada. Timber prices commercially available to lumber producers for comparable timber from sources outside Canada therefore provide the only logical basis for determining the benefit.

19. The Commerce Department's use of U.S. prices, as opposed to other world market prices from other countries such as Sweden, Austria, Russia or Germany, is supported by ample record evidence indicating that many Canadian companies do, in fact, import U.S. logs and bid on U.S. stumpage. U.S. timber is therefore "commercially available" to Canadian lumber mills. In light of the specific facts of this case, the Commerce Department's use of U.S. prices for stumpage that is commercially available to lumber producers in Canada was therefore appropriate and consistent with Article 14(d).

**(c) What is the legal basis for the US assertion that the market conditions referred to in Article 14(d) relate to what the market price would have been "but for" the subsidies and their distortive effects?**

Answer:

20. The United States' interpretation of Article 14(d) is consistent with the general meaning of "benefit" as previously articulated by panels and the Appellate Body, i.e., a benefit is some form of advantage that would not otherwise be available in the marketplace, absent the financial contribution. In *Canada Aircraft*, the panel stated:

> . . . "benefit" clearly encompasses some form of advantage . . . . In order to determine whether the financial contribution . . . confers a "benefit", *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case *but for* the financial contribution. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is

[36] *See* EC Third Party Submission, para. 18.

> the market. Accordingly, a financial contribution will only confer a "benefit", *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market.[37]

21. The Appellate Body has stated that the word "benefit" also implies some type of comparison. In *Canada Aircraft*, the Appellate Body stated:

> We also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient *"better off" than it would otherwise have been, absent the contribution*. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the *trade-distorting potential* of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient in the market.[38]

22. Article 14 sets out specific methodologies for making the comparison described by the Appellate Body. The specific methodology in Article 14(d) should therefore be interpreted to achieve an appropriate comparison of the financial contribution to the marketplace, i.e., a comparison that would identify the potentially trade-distorting artificial advantage resulting from the government's financial contribution.

> **(d) Is it necessary in the US view that the "market price" be "independent of the distortion caused by the government's action" (Determination at page 43,195) for such a price to be used as a benchmark?**

Answer:

23. As noted in our response to question 2(c) to the United States, the comparison in Article 14(d) is intended to identify the potentially trade-distorting artificial advantage resulting from the government's provision of a good (financial contribution). It is the view of the United States that commercially available prices in the country under investigation are normally the most appropriate benchmark. However, where the evidence indicates that the government so dominates the market that non-government domestic prices for the good in question are

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[37] *Canada Aircraft - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as affirmed by the Appellate Body, adopted 20 August 1999, para. 9.112 (emphasis added).

[38] *Canada Aircraft - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body, 2 August 1999, para. 157 (emphasis added) ("*Canada Aircraft* Appellate Body Report").

suppressed by the alleged below-market government prices for that good, the domestic prices cannot serve as a logical basis to measure the potential benefit. Measuring the benefit based on a price that is distorted by the same government action that led to the inquiry in the first place would defeat the purpose of the Article 14(d) comparison. In such cases, other prices commercially available to producers in the country under investigation can provide an appropriate benchmark. As discussed in our written submission and, more fully, at the first substantive meeting with the Panel, the United States believes that the facts of this case, which are outlined below in response to question 3 to the United States, support the preliminary determination to use prices for timber in comparable U.S. states, which are commercially available to Canadian lumber producers.

**(e) Is it the position of the US that market prices can only be used as a benchmark if such market prices are free of <u>any</u> government intervention?**

<u>Answer</u>:

24. No. As discussed above, the purpose of the Article 14(d) comparison is to determine what, if any, advantage flows from the government's financial contribution (i.e., the provision of a good), not other government actions. As we indicated in response to question 2(d) to the United States, market prices that are distorted by the government financial contribution at issue could not logically serve as a benchmark.

**(f) In the view of the US, if the market price in the country under investigation is below the world market price, will this market price then automatically be considered to have been distorted?**

<u>Answer</u>:

25. No. The only instance in which we might even inquire into whether prices in the country under investigation are below world market prices would be where there is other evidence indicating that the non-government prices in the country under investigation may be distorted by the government financial contribution at issue. In this case, as discussed below in response to question 3 to the United States, there was evidence that non-government prices in Canada were suppressed by the provincial governments' provision of timber.

**(g) In the DOC determination (at page 43,194) it is stated that "if the government provider constitutes a majority or a substantial portion of the market, then such prices will no longer be considered market based." What in the US view is a substantial portion?**

**(i) Does this statement relate to all market determined prices stemming from actual transactions within the country under investigation?**

**(ii) Or only to those of competitively-run government auctioned stumpage?**

Answer:

26. In this case, and in the only other case in which the Commerce Department has addressed this issue, the government's share of the market was 90 percent or more. However, each case must be evaluated on the basis of its particular facts. Normally, where the government dominates the market for a particular good and there is some evidence that government prices are suppressing the rest of the market, the non-government prices could not logically serve as a benchmark.[39] However, that may not always be the case. For example, even where the government dominates the market, if there is an open and competitive auction for some significant portion of the market, those prices could serve as a benchmark. But competitive auctions are, of course, not the only situation that could provide a competitive benchmark. There may also be other instances in which the facts would indicate that the non-government portion of the market was undistorted by the government action. In such cases, the non-government portion of the market could also serve as a benchmark.

**(h) Why did the DOC not rely on the stumpage prices in the Maritime provinces as lumber from the Maritimes was acknowledged to be free of any subsidies?**

Answer:

27. The Commerce Department requested information on private stumpage prices and prices in the spot market for logs in the Maritime Provinces.[40] In their questionnaire response, the

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[39] The actual percentage necessary to "dominate" the market for a particular good may depend on the specific features of that market.

[40] *See* Exhibit U.S.-29.

Maritime Provinces stated that they had no information on private stumpage prices.[41] With respect to the log prices in the spot market, the Maritime Provinces stated:

> There is no spot market price for harvested saw logs from Crown land. The Province does not collect any data concerning spot market prices for any of the above-described categories of logs harvested from private land. Certain price information concerning privately-owned land is published in Atlantic Forestry Review . . . which reports a sampling of prices offered, and the Canadian Sawlog Journal . . . which reports a sampling of prices paid by certain mills. The Province was not involved in the collection or publication of such price data, and the surveys conducted by these publications appear to be based on limited sampling.[42]

Given this limited and inadequate information, the Commerce Department was unable to consider whether Maritime prices could serve as an appropriate benchmark.

**3. What information did the USDOC request from Canada and what information was received with regard to private stumpage prices?**

Answer:

28. In its original questionnaire dated May 1, 2001, the Commerce Department asked a series of standard questions regarding private prices in each province or territory. These questions are reproduced in Exhibit U.S.-30.[43]

29. Only the governments of Alberta, Quebec and Ontario provided any information in response to this request. And, as described below, only Quebec and Ontario actually provided private prices. This limited information was insufficient to form the basis for a benchmark for these provinces. In addition, there was information on the record indicating that these private stumpage prices were depressed by the government prices. The largest province in terms of softwood lumber production, British Columbia (representing approximately 60 percent of

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[41] Questionnaire Response of the Government of Newfoundland, vol. 1, pages 6, 8 (June 28, 2001) (Exhibit U.S.-29); Questionnaire Response of the Government of New Brunswick, vol. 1, pages 5-8 (June 28, 2001) (Exhibit U.S.-29); Questionnaire Response of the Government of Nova Scotia, vol. 1, pages 5-9 (June 28, 2001) ("GONS June 28 Response") (Exhibit U.S.-29).

[42] GONS June 28 Response, at vol. 1, page 5 (Exhibit U.S.-29).

[43] Quebec's questions were slightly different due to the parity technique employed in Quebec. Questions regarding the Yukon and Northwest Territories were directed to the Government of Canada.

Canada's softwood lumber production), did not provide any private prices for stumpage. The information on the record is summarized below.

30. Alberta: The Government of Alberta did not provide private prices. The Government of Alberta stated: "Alberta does not track private timber harvesting and does not have any data on any private timber used in mills."[44] It also stated that it "does not collect spot price information for logs from provincial or private lands" and it therefore was "not providing such spot log price information" to the Commerce Department.[45]

31. The only information Alberta did provide was a two-page excerpt from a KPMG survey, which contained a single estimated stumpage value derived from some price data for log sales. In describing this data, Alberta stated:

> beginning in 1993, Alberta has had a consultant collect information on an annual basis on the value of arms length log purchases in the province. This information, which does not differentiate between private and crown wood, has been used by the province to develop a means for mediating disputes between timber operators and other industrial operators concerning the value of standing timber adversely affected by industrial operations.[46]

No supporting evidence or source information for the estimates was provided.

32. Quebec: The Government of Quebec stated: "Private market standing timber prices are obtained through a market survey of forestry companies that trade standing timber for harvesting every year in Quebec." They added: "The survey allows the government to obtain average provincial standing timber values for the spruce-jack pine-fir-larch species group."[47] However, as discussed below, the Commerce Department also had evidence, including statements by a provincial forestry official, that private stumpage prices in Quebec are suppressed by the administratively-set price for Crown stumpage.[48]

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[44] GOA June 28 Response, at vol. 1, page AB-VII-1 (Exhibit U.S.-24).

[45] *Id.* at vol. 1, page AB-I-8 (Exhibit U.S.-24).

[46] *Id.* (Exhibit U.S.-24).

[47] GOQ June 28 Response, at vol. 1, page 118 (Exhibit U.S.-22).

[48] *Preliminary Determination*, 66 Fed. Reg. at 43195, citing *Petition for the Imposition of Countervailing Duties: Certain Softwood Lumber Products from Canada*, at 119 (April 2, 2001) ("Petition") (Exhibit CDA-1); *see also* Quebec Private Study (Exhibit U.S.-31).

33. Ontario: Ontario stated that over ten percent of the timber consumed in Ontario's "forest products industry" is harvested from private lands. However, that figure covers the entire forest products industry, including companies that do not produce the subject merchandise (e.g., pulp mills). Moreover, Ontario stated that it does not regulate or monitor the private timber market on an ongoing basis, and therefore does not collect these data in the course of normal operations.

34. However, Ontario commissioned an independent forestry research firm to conduct a survey,[49] which was provided to the Commerce Department on July 30, 2001.[50] The Commerce Department found numerous flaws with this study. In the Preliminary Determination, the Commerce Department noted that "many private land holders do not actively market their standing timber and that many sales were not actually contested or open to competition." It noted that "[i]n fact, only 21 percent of landowners state that the price for stumpage was market determined."[51] Other problems included the fact that survey prices appeared to include "transfer prices" between an individual who was both a logger and wood lot owner; and the fact that the reported "prices" did not include any information about quality or grade (which are critical to proper valuation). Finally, the survey admitted that a large landowner could exercise market power but ignored the fact that the Crown owned 87 percent of the land.

35. Evidence of Price Suppression: The record also contained the following evidence indicating that private stumpage prices were depressed by the overwhelming majority of government-supplied timber in the market.

36. For example, a Canadian forestry expert concluded that:

> The *quasi-monopolistic importance of the State in the supply* of the industries *obligates the small producers to align their prices with those of the public forest.* The low prices have dulled the interest of the owner regarding the improvement of its wooded lot.[52]

In addition, information by an organization representing the private timber owners in Quebec stated that the government supply of timber had a direct influence on the "ability" of private owners to sell at a true market price. The representative stated that he:

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[49] GOO June 28 Response, at vol. 1, page 7 (Exhibit U.S.-23).

[50] Letter from Hogan & Hartson to Department of Commerce (July 30, 2001) (Exhibit U.S.-32).

[51] *Preliminary Determination*, 66 Fed. Reg. at 43195 (Exhibit CDA-1).

[52] Luc Parent, "A Financial Strategy for the Development of Private Timber Lands in Quebec" at 87 (translated) (June 1995) (emphasis added), contained in Petition, Exhibit IV G-6 (Exhibit U.S.-33).

> believes that the *payments for wood coming from the public forest have a direct influence on the ability to sell their wood at a price that will cover their costs of production.*[53]

Another source indicated that:

> [t]he *stumpage rates in public forests . . . cause significant market harm to owners of private forests' . . .* estimate[d] at C$100 million per year.[54]

37. The Cree First Nation, a Canadian aboriginal group, also stated that:

> . . . given that the volume of wood coming from forestry companies operating in public forests dwarfs the volume from private sources, and given that *private wood producers usually have to sell their wood to mills held by companies with a Timber Supply and Forest Management Agreement, which already have a perpetual public wood supply, downward pressure on the price of private wood is built into the system.* This serves to keep stumpage values low.[55]

Finally, as noted in the Preliminary Determination, even a provincial forestry official in Canada stated in writing that private stumpage prices were affected by the administratively-set price for public stumpage.[56]

38. It is readily apparent from the above summary that there was not sufficient evidence of private prices in Canada to establish a benchmark.[57]

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[53] Rejean Soleil, "Wood Producers in Bad Mood" Le Soleil (translated) (April 13, 2000) (emphasis added), contained in Petition, Exhibit IV I-2 (Exhibit U.S.-33).

[54] Loæc Hamon, "Stumpage Rate Increase, Federation Begs the Minister to Stand Tall" La Terre de Chez Nous (translated) (March 16, 2000) (emphasis added), contained in Petition, Exhibit IV I-2 (Exhibit U.S.-33).

[55] Letter from the Grand Council of the Crees, page 32 (April 13, 2000) (emphasis added), contained in Petition, Exhibit IV H-6 (Exhibit U.S.-33).

[56] *Preliminary Determination*, 66 Fed. Reg. at 43195 (Exhibit CDA-1).

[57] In addition to the evidence of price suppression discussed above, the United States notes that, in almost every province, tenure holders cut a significantly smaller volume of timber than the "annual allowable cut" that they are allotted under their licenses. Thus, sawmills who purchase logs from "independent" loggers have no need to buy such logs unless sales are made at (or close to) the administered government price.

**4. At paragraph 40 of its first written submission, the United States indicates that only a "tiny fraction" of the log sales in Canada are "non-government" sales. Please provide the factual details behind this statement, by province. Please provide the relevant documents of record, or if already submitted by either party, reference to the relevant exhibits in this dispute.**

Answer:

39. The statement at paragraph 40 of the United States' First Written Submission pertained to the small private market for stumpage, not log sales. The evidence on the record at the time of the Preliminary Determination indicated that Crown and private stumpage sales were the following percentages of the harvest in each province:

| | Crown Sales | Private Sales |
|---|---|---|
| British Columbia: | 90 percent | 10 percent |
| Quebec: | 83 percent | 17 percent |
| Ontario: | 92 percent | 8 percent |
| Alberta: | 98 percent | 2 percent |
| Manitoba: | 94 percent | 6 percent |
| Saskatchewan: | 90 percent | 10 percent |

40. As discussed above, in response to question 3 to the United States, only two of the provinces provided very limited data on private stumpage prices, and record evidence indicated that those prices were, in any event, suppressed by the governments' administratively-set prices.

**5. At page 3 of its oral statement, the United States states that "it is therefore from the perspective of the recipient that we examine subsidies under the Agreement" (para.10). With regard to the proper interpretation of Article 14 SCM concerning the determination of the amount of benefit, the US asserts that Canada would "require the US to measure the governments' prices against prices that reflect the very distortion that we are attempting to measure" (page 9, para 24). In the US view, should the authority under Article 14 SCM try to determine the amount of the benefit to the recipient or the amount of alleged distortion caused by the subsidies?**

Answer:

41. As stated in the chapeau to Article 14, and confirmed by the Appellate Body,[58] the benefit for purposes of paragraph 1 of Article 1 is the benefit to the recipient. It is therefore the benefit to the recipient that is measured under Article 14. As discussed in response to question 2(c) to the United States, a benefit is some form of advantage. It is the artificial advantage – or benefit – that the Appellate Body has referred to as the "trade-distorting potential" of a financial contribution.[59] It is to that trade-distorting artificial advantage that the United States was referring in the passage cited by the Panel in its question. As stated in response to question 2(d) to the United States, where, as here, the evidence indicates that the government so dominates the market that non-government domestic prices for the good in question are suppressed by below-market government prices for that good, the domestic prices cannot logically serve as a basis to measure the benefit.

**6. Can the US distinguish this case from the relevant facts and reasoning of the Panel and the AB in the Lead and Bismuth II case in relation to the pass-through analysis which determines who benefits from subsidies.**

Answer:

42. *Lead and Bismuth II* concerned subsidies to a government-owned entity, British Steel, which was subsequently sold to private investors. The United States had found that those prior subsidies continued to benefit the privatized entities, UES and BSplc. The panel agreed that

> a "financial contribution" does not have to be bestowed directly on a company in order to confer a "benefit" on that company. For example, one company may be found to "benefit" from a "financial contribution" conferred on another company.

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[58] *Canada Aircraft* Appellate Body Report, paras. 155-158.

[59] See footnote 38 and accompanying text.

> Furthermore, in certain circumstances an untied, non-recurring "financial contribution" bestowed directly on, and benefitting, a prior company may be deemed to have been bestowed indirectly on the successor company.[60]

However, the panel stated that the presumption that the benefit flowing from a non-recurring financial contribution continues to flow, even after a change in ownership that created an apparently new and distinct producer and exporter, could not be irrebuttable.[61] Specifically, the panel found that "with regard to certain changes in ownership, pre-change in ownership 'financial contributions' will only remain actionable if a valid, post-change in ownership, 'benefit' determination has been made."[62] The panel found that the circumstances in that proceeding, in which British Steel's specialty steels business was first transferred to the partnership UES and then re-acquired by BSplc, rebutted the presumption that the benefit to British Steel continued in UES and BSplc. The panel also found that UES and BSplc were distinct legal persons which, because they had paid fair market value for the assets of British Steel, obtained no benefit from the prior subsidies to British Steel.[63]

43. It is evident from the above summary that *Lead and Bismuth II* addressed a unique issue and set of circumstances that are not present in this case. Most significantly, in the present case the subsidies at issue were bestowed directly on the current producers of the subject merchandise. The evidence simply does not support Canada's claim of a significant volume of timber harvested by independent loggers who sell at arm's-length to lumber mills. Specifically, as discussed above in response to question 1 to the United States, the vast majority of Crown sawtimber is provided to Canadian lumber mills under tenures held directly by those mills. Record evidence also indicates that most "independent" loggers are in fact bound by law or by contract to those very same sawmill/tenure holders. Thus, the entity receiving the financial contribution (the provision of timber) and the entity receiving the benefit (below-market stumpage prices) are generally one and the same.

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[60] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, Report of the Panel, 23 December 1999, para. 6.58, fn. 69 ("*Lead and Bismuth II* Panel Report").

[61] *Id.* at para. 6.71. The Appellate Body concurred. *See United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body, 10 May 2000, para. 62 (*"Lead and Bismuth II* Appellate Body Report").

[62] *Lead and Bismuth II* Panel Report, para. 6.76.

[63] *Id.* at para. 6.81. The Appellate Body concurred. *See Lead and Bismuth II* Appellate Body Report, para. 68.

44. In theory, a true arm's-length transaction between a truly independent logger and a lumber mill may give rise to the issue of whether the financial contribution to the logger conferred a benefit on the lumber producers. However, in this case, there is ample evidence that, with respect to the small volume of the Crown harvest not under tenure to sawmills, either the provincial governments require that the timber be processed in specific mills, or the logger/tenure holders are under contract to the sawmill/tenure holders. Thus, as discussed in response to question 8 to Canada, the evidence indicates that there are virtually no truly arm's-length transactions between harvesters and lumber mills.

45. There are only two other situations in this case in which the issue of whether a financial contribution to one entity confers a benefit on another may arise: (1) logs harvested by one sawmill and then sold in arm's-length transactions to other sawmills; and (2) lumber sold in arm's-length transactions to companies that produce remanufactured lumber products. For the reasons discussed below in response to question 7 to the United States, those issues are not relevant in an aggregate case.

**7. Is the US arguing (e.g., at paragraph 81 of its first written submission) that a pass-through analysis to determine whether an entity other than the direct recipient of the financial contribution benefits from the financial contribution, is only required in case of a company-specific CVD investigation and duty determination?**

Answer:

46. As discussed previously, in an aggregate case, the Commerce Department determines the total amount of the subsidy to producers of the subject merchandise and allocates that amount over all sales of the subject merchandise. Thus, when all of the alleged recipients of the financial contribution and the benefits are producers of the subject merchandise, no further analysis is required to perform the aggregate calculation. The precise amount of the benefit received by any specific producer would only be determined in a company-specific review. However, if the government made the financial contribution to an entity that does *not* produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that *does* produce the subject merchandise.

47. In this case, the only allegation of a financial contribution to an entity that does not produce the subject merchandise is Canada's claim that there is a significant volume of Crown timber that the provincial governments provide to independent loggers who then sell the timber at arm's-length to lumber mills. However, as discussed above in response to questions 1 and 6 to the United States, the evidence does not support Canada's claim.

48. Canada also argues that the Commerce Department was required to perform a pass-through analysis to address two other situations: (1) logs harvested by one sawmill and then sold in arm's-length transactions to other sawmills; and (2) lumber sold in arm's-length transactions to companies that produce remanufactured lumber products. However, in both of these situations, all of the entities involved are producers of the subject merchandise. Therefore, no further analysis is required in an aggregate case.

49. Specifically, a separate benefit analysis is not required in an aggregate case for logs harvested by one sawmill and allegedly sold at arm's-length to another. If Sawmill A and Sawmill B both harvest Crown timber, and Sawmill A trades some of its logs to Sawmill B, it does not matter whether some, all or none of the benefit received by Sawmill A is passed through to Sawmill B, as the full benefit is always enjoyed by a sawmill, i.e., a producer of the subject merchandise. The benefit is therefore properly included in the aggregate calculation.

50. Likewise, the remanufactured articles at issue are within the scope of the investigation. The Commerce Department therefore properly matched the total benefit received by producers of the subject merchandise (the numerator) to the total sales of the subject merchandise, including remanufactured products (the denominator) without determining any company-specific rates. As the European Communities ("EC") points out, if any individual producer of subject merchandise believes that it has not received any countervailable benefit, the procedures for review exist.[64] In sum, for remanufacturers who produce merchandise within the scope of the investigation, it is only in the context of determining a company-specific subsidy rate that a pass-through analysis may be necessary.

**8. In the Preliminary Determination (at page 43,125) and in para. 11 of the US first written submission, it is stated that provisional measures would be applied retroactively. Does this mean that the US acknowledges that these retroactive measures were "provisional" measures in the sense of Article 17 SCM?**

Answer:

51. Article 17 of the SCM Agreement does not define "provisional measure." The only indication in Article 17 of what constitutes a provisional measure is found in Article 17.2, which states:

> Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

[64] EC Third Party Submission, para. 38.

52. There seems to be no question that provisional countervailing duties would constitute a provisional measure within the meaning of Article 17. Under the Anti-dumping Agreement, provisional duties and security in the form of cash deposits or bonds are considered alternative measures.[65] Although Article 17.2 of the SCM Agreement is somewhat ambiguous, a cash deposit or bond requirement would also appear to constitute a provisional measure within the meaning of Article 17. While the United States did not impose a provisional duty, it did require security in the form of cash deposits or bonds.

53. There is no reference in Article 17.2 to withholding of appraisement, which is referred to in the United States as suspension of liquidation.[66] Under U.S. law, suspension of liquidation is merely a legal status that enables the assessment of additional duties when all of the issues related to final duty liability are resolved. Suspension of liquidation may occur for a variety of reasons totally unrelated to countervailing duties (e.g., a pending valuation or classification decision).

54. Suspension of liquidation does not delay entry of the imported merchandise and does not in itself impose any requirement on the importer. Nevertheless, under the U.S. countervailing duty law, suspension of liquidation is treated as a provisional measure. In particular, consistent with Article 17, suspension of liquidation is ordered only after preliminary affirmative determinations of injury and subsidization, and suspension of liquidation is terminated after four months, unless final affirmative determinations have been made.

**9. Does the United States consider that retroactive application of a provisional measure (i.e., suspension of liquidation and posting of security in the form of cash deposits or bonds - US First Written Submission at paragraph 11) is the only mechanism through which, in practical terms, it is possible to exercise the right under Article 20.6 to apply definitive duties retroactively under the defined circumstances? Please explain.**

Answer:

55. Under U.S. law, absent suspension of liquidation, final duties are assessed and no additional duties can be imposed on that entry. Suspension of liquidation is the only legal way to ensure an entry will not be liquidated, i.e., that additional duties can be assessed later, after a critical circumstances inquiry is completed. Suspension of liquidation is therefore essential to

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[65] *See* Article 7.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

[66] In contrast, Article 7.2 of the Anti-Dumping Agreement specifically refers to withholding of appraisement as a provisional measure.

preserve the possibility of exercising the right under Article 20.6 to impose duties retroactively. The issue of posting cash deposits and bonds is addressed in response to question 10 to the United States.

**10. Would the suspension of liquidation of import entries, without the posting of security as above, be sufficient to preserve the right to later apply definitive duties retroactively pursuant to Article 20.6, provided that the circumstances defined in that Article were found to exist? Why or why not? What is the significance, if any, of the fact that there is no analogue in the SCM Agreement to Article 10.7 of the Anti-Dumping Agreement? Is it the US position that measures of the type referred to in AD Article 10.7 are prohibited in the countervail context?**

Answer:

56. Suspension of liquidation would, as explained in response to question 9 to the United States, enable the Commerce Department to delay final determination of total duty liability. However, under Article 20.3 of the SCM Agreement, absent the posting of a security, the retroactive assessment amount would be zero. Specifically, Article 20.3 states: "If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected." Thus, if no amount is guaranteed by a cash deposit or bond, Article 20.3 would, on its face, preclude the collection of duties retroactively. It is the view of the United States that Article 20.3 further supports our position that the Members intended that provisional measures could be applied retroactively. The right to retroactive relief can be preserved only by properly interpreting the phrase "subject to the exceptions set out in this Article" found in Article 20.1 to provide for retroactive provisional measures when there is sufficient evidence that the circumstances defined in Article 20.6 exist. When it is interpreted as Canada proposes, Article 20.6 is rendered a nullity and no retroactive relief is available.

57. The absence of an analogue in the SCM Agreement to Article 10.7 of the Anti-Dumping Agreement does not alter the above analysis. Article 10.7 of the Anti-Dumping Agreement states that authorities may, "after initiating an investigation," take measures such as withholding of appraisement as may be necessary to collect duties retroactively. Thus, Article 10.7 authorizes authorities to take measures even before there is a preliminary determination of dumping or injury, which is normally required for the imposition of provisional measures under Article 7 of the Anti-Dumping Agreement. In the case concerning *Hot-Rolled Steel from Japan*, the panel viewed these special "precautionary measures" as something other than provisional measures.[67] Because there is no analogue to Article 10.7 in the SCM Agreement, there is no exception to the requirements of Article 17.1 of the SCM Agreement that would permit early

[67] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, 28 February 2001, para. 7.155 ("*Hot-Rolled Steel from Japan* Panel Report").

"precautionary measures" such as those provided for in Article 10.7 of the Anti-Dumping Agreement. However, the fact that the SCM Agreement does not contain an exception for such early measures, i.e., measures any time after initiation, is irrelevant because the Commerce Department did not take such measures in this case. Where, as in this case, provisional measures are imposed in accordance with the requirements of Article 17 (i.e., after preliminary determinations of subsidization and injury), Article 20.1 permits a Member to expand the scope of those provisional measures to encompass entries during the period 90 days prior to the preliminary determination if there is sufficient evidence that the circumstances described in Article 20.6 exist.

**11. In its explanation of the rationale behind making a preliminary critical circumstances determination in the Lumber investigation, the DOC stated that "the purpose of the Department's preliminary critical circumstances determination is to preserve the possibility of this retroactive relief where there is reasonable cause to believe or suspect that such relief may be warranted by taking the limited step of suspending liquidation of entries during the period 90 days prior to the preliminary determination" (citing Section 703(e)(2) of the Act, and 19 CFR 351.206(a)). Preliminary Determination at page 43,189 (Exh. CDA-1). Why was this approach not followed in this case, i.e., why was a provisional measure (not simply suspension of liquidation) applied for the entire retroactive period (Preliminary Determination at page 43,215).**

Answer:

58. As explained in response to questions 9 and 10 to the United States, both suspension of liquidation and the posting of bonds or cash deposits are necessary to ensure the possibility of exercising the right to retroactive relief provided for in Article 20.6 of the SCM Agreement. It is therefore the Commerce Department's standard practice, which was followed in this case, to require both suspension of liquidation and security for entries within the period 90 days prior to the preliminary determination when there is an affirmative preliminary finding of critical circumstances. The reference to "suspension of liquidation" in the Preliminary Determination is a short form of reference sometimes used by the Commerce Department when discussing provisional measures generally, including posting of bonds or cash deposits.

**12. Could the US please explain the standard of evidence required for the determination of injury caused by massive imports under Article 20.6 SCM?**

Answer:

59. Article 20.6 requires a finding of "injury which is difficult to repair," but does not contain an evidentiary standard for that determination. However, this issue was addressed in

*Hot-Rolled Steel from Japan*, which concerned the analogous critical circumstances provisions of the Anti-Dumping Agreement.[68]

60. At issue in *Hot-Rolled Steel from Japan* was the evidentiary standard in the U.S. anti-dumping law for a preliminary critical circumstances finding. That evidentiary standard is "a reasonable basis to believe or suspect" that critical circumstances exist. As discussed previously, that is also the standard applied under the U.S. countervailing duty law for a preliminary critical circumstances finding. With respect to that standard, the *Hot-Rolled Steel from Japan* panel correctly noted that the standard "seems to refer to the conclusion reached on the basis of the evidence presented, that is, a legal mindset that certain facts exist, based on the evidence presented."[69] The panel found, however, that in applying the "reasonable basis to believe or suspect" standard, the Commerce Department has "made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied."[70]

61. As the *Hot-Rolled Steel from Japan* panel also noted, "sufficient evidence" refers to the quantum of evidence necessary to make a determination.[71] What constitutes "sufficient evidence" varies depending on the nature of the determination in question. The approach taken by other panels "has been to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination."[72] The issue therefore is whether the evidence before the Commerce Department at the time of the Preliminary Determination was such that an unbiased and objective authority evaluating that evidence could have determined that there was a reasonable basis to believe or suspect that critical circumstances existed.

62. In *Hot-Rolled Steel from Japan*, the panel also found that consideration of whether massive dumped imports seriously undermine the remedial effect of the definitive anti-dumping duty at the preliminary stage would, at best, be speculative. Requiring an authority "to undertake what is likely to be an impossible, meaningless task" was not, in the panel's view,

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[68] *See Hot-Rolled Steel from Japan* Panel Report.

[69] *Id.* at para. 7.144.

[70] *Id.*

[71] In contrast, the term "positive evidence" refers to the nature or type of evidence necessary. "Positive evidence" is defined as "direct" evidence, which is in turn defined as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Black's Law Dictionary* 1182, 577 (7th ed. 1999) (Exhibit U.S.-34). Positive evidence therefore is not speculative evidence.

[72] *Hot-Rolled Steel from Japan* Panel Report, para. 7.153.

necessary or appropriate.[73] It is the view of the United States that the *Hot-Rolled Steel from Japan* panel's rationale is equally valid in the context of Article 20.6 of the SCM Agreement.

**13. Can an exporter request administrative review under section 351.213(b) of the Regulations if the investigation was conducted on an aggregate basis? If not, can an exporter included in such an investigation request an administrative review under any other provision of the Regulations? Please explain.**

Answer:

63. Section 351.213(b) of the regulations does not apply to aggregate cases but it does not restrict the Commerce Department's authority to conduct reviews. In particular, section 351.213(k) provides for exporters to request a review to determine if their subsidy rate is zero. This regulation alone is sufficient to fulfill the United States' obligations under the SCM Agreement.

64. Article 21.2 of the SCM Agreement, on which Canada's claim is based, states:

> The authorities shall review the need for the continued imposition of the duty, *where warranted*, on their own initiative or, *provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty*, upon request by any interested party which submits *positive information substantiating the need for a review*. Interested parties shall have the right to request the authorities to examine whether the *continued imposition of the duty is necessary to offset subsidization*, whether the injury would be likely to continue to recur if the duty were removed or varied, or both. *If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.*[74]

The inquiry required in Article 21.2 is whether continued imposition of the duty is necessary to offset subsidization. The reference to "continued" imposition of the duty underscores the inherently prospective nature of the inquiry.[75] Moreover, the reference to termination of the duty indicates that Article 21.2 only addresses the issue of whether there should be no duty imposed, not whether the duty rate should be adjusted up or down. This was confirmed by the

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[73] *Id.* at para. 7.148.

[74] Emphasis added.

[75] *See United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel, 29 January 1999, para. 6.27 (interpreting Article 11.2 of the Anti-Dumping Agreement which is the analogue to Article 21.2 of the SCM Agreement).

Appellate Body in *Lead and Bismuth II*. In that case, the Appellate Body noted that Article 21.2 provides a review mechanism to ensure, consistent with Article 21.1, that a countervailing duty shall remain in force only as long as necessary to counteract injurious subsidies.[76] Specifically, the Appellate Body stated that:

> in order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on subsidization, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be any need for a countervailing duty.[77]

65. Under section 351.213(k) of the regulations, exporters have the opportunity for a review to determine whether imposition of a duty is necessary on future entries, i.e., whether their subsidy rate is zero. If no subsidy is found, the cash deposit and assessment rate on future entries will be zero, unless the results of a subsequent review demonstrate that subsidies have recurred. Section 351.213(k) therefore fulfills the requirements of Article 21.2.

Questions to Both Parties

**1. Within the Canadian system of tenure plus stumpage fees, when does the "provision of a good" (whether by the government or by someone else) take place?**

Answer:

66. While some financial contributions take place at a single point in time, that is not always the case. For example, when a government gives a cash grant, the financial contribution (the grant) is normally a one-time event made at a particular point in time – when the grant is awarded. We refer to such a subsidy as "non-recurring." The benefit (the amount of the grant) from a non-recurring subsidy is normally amortized over a specific number of years.

67. However, if the government passes a law giving a tax break to a specific industry, the financial contribution (the revenue foregone) does not only occur at the time the law is passed. Rather, the financial contribution continues as long as the law remains in force. We refer to that type of subsidy as "recurring." The benefit from a recurring subsidy is expensed in the year of receipt. For example, the tax benefit, in the amount of the tax savings, is received each year when the company files its tax return and takes advantage of the special tax break.

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[76] *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body, 10 May 2000, para. 53.

[77] *Id.* at para. 54.

68. The Canadian timber tenures are long-term contracts. Like the tax law, the tenures are recurring subsidies. As long as the tenure contract remains in force the provincial government is providing the lumber producer with timber, and the producer receives a benefit each time it pays below-market prices for the timber. Because this is a recurring subsidy, the Commerce Department expensed the benefits in the year of receipt, the year in which the tenure holder was billed for the stumpage fees.

69. Canada confuses the Commerce Department's calculation of the recurring benefit with the financial contribution, i.e., the provision of the timber.[78] Specifically, Canada claims that the *benefit* is received when the timber is harvested; therefore, the act of harvesting (which is not performed by the government) is the financial contribution. That is simply not true. First, the benefit is received when the lumber producer pays for the timber, which in this case happens to be at the time of harvest. Second, the act of harvesting does not constitute the financial contribution. That is like saying that, in the case of a tax benefit, the act of filing the tax return (which is performed by the taxpayer, not the government) is the financial contribution. The provincial governments provide the timber by placing it at the lumber producer's disposal under the tenure contract. As long as the timber remains at the lumber producer's disposal, the government is providing a good within the meaning of Article 1.1(a)(1)(iii).

**2. What international market prices are available or exist for softwood lumber?**

Answer:

70. While there is no uniform world market price for softwood lumber and softwood logs, lumber and logs are traded internationally in all regions of the world. The top five markets for U.S. softwood lumber are Canada, Japan, Mexico, the Dominican Republic and Spain. The top five markets for U.S. softwood logs are Japan, Canada, Korea, China and Taiwan.[79] Other major softwood lumber-/log-exporters include Canada, the European Union, Russia, South Africa and Brazil. It is possible to calculate average unit import values for lumber and logs in various countries based on either import or export statistics. However, because these statistics are kept on a broad product category basis, the average unit import values are not useful for comparison purposes. We are continuing our attempts to identify other possible sources of worldwide market prices for lumber and logs.

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[78] *See* Canada Oral Statement, para. 23.

[79] *See* U.S. Department of Agriculture's Foreign Agriculture Service, *Wood Products: International Trade and Foreign Markets; Annual Trade Statistical Edition*, available at www.fas.usda.gov.

**3. In its discussion with the Panel during the first substantive meeting of the Panel with the parties, Canada referred to the accession protocol of China to the WTO in support of its argument that Article 14(d) SCM requires Members to assess the benefit on the basis of the market conditions in the country under investigation, and not on the basis of a benchmark outside the country under investigation. What in the parties view is the relevance of the China protocol for the interpretation and application of Article 14(d) SCM Agreement?**

Answer:

71. Article 15(b) of the *Protocol on the Accession of the People's Republic of China* ("China Protocol") restates and clarifies the rights and obligations of all Members under Article 14 of the SCM Agreement, including paragraph (d). It confirms that Article 14(d) of the SCM Agreement allows Members to assess the benefit, in certain instances, on the basis of world market prices.

72. The United States negotiated the language of Article 15(b) of the China Protocol. The language comes directly from the bilateral agreement between the United States and China and was intended to clarify that Article 14 of the SCM Agreement allows authorities to measure the benefit on the basis of a benchmark outside the country of investigation when prevailing terms and conditions in the country of investigation are "not . . . available as appropriate benchmarks." Although Article 14 of the SCM Agreement already allows Members to use such benchmarks, the Members incorporated this clarifying language into Article 15(b) of the China Protocol because they were particularly concerned that prices between buyers and sellers in China would normally not be appropriate benchmarks while China was transitioning to a market economy and they wanted to leave no doubt that Article 14 of the SCM Agreement allowed authorities to use external benchmarks in such instances.[80] In addition, because Article 14 only addresses Members' countervailing duty proceedings (under Part V of the SCM Agreement), they wanted to make clear that external benchmarks would also remain available were a Member to pursue a WTO proceeding under Part II or III of the SCM Agreement.

73. Article 15(b) is only one of several provisions of the China Protocol that simply restate and clarify existing WTO obligations that apply to all Members. Article 10.1 of the China Protocol, for example, restates existing obligations in Article 25 of the SCM Agreement

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[80] *See* Report of the Working Party on the Accession of China, WT/MIN (01)/3, 10 November 200, para. 171 (generally noting that "[s]ome members of the Working Party expressed concern that the special features of China's economy, in its present state of reform, still created the potential for a certain level of trade-distorting subsidization; this could have an impact not only on access to China's domestic market, but also on the performance of Chinese exports in the markets of other WTO Members, and should be subject to effective SCM Agreement disciplines.").

regarding subsidies notifications to the WTO. Several articles of the China Protocol also restate and clarify existing WTO most-favored nation and national treatment obligations.[81]

74. The inclusion of Article 15(b) in the China Protocol therefore does not, as Canada argues, mean that Article 14(d) of the SCM Agreement would otherwise require Members to assess the benefit on the basis of prices in the country under investigation. Article 15(b) of the China Protocol was, in fact, intended to clarify and confirm that Article 14(d) of the SCM Agreement allows authorities to measure the benefit on the basis of prices outside the country of investigation when prices in the country of investigation are "not . . . available as appropriate benchmarks."

**4. Please provide copies of representative stumpage contracts in Canada, as well as copies of the relevant underlying provincial legislation.**

Answer:

75. This information has been provided above in response to question 1 to the United States.

**5. What information concerning the pass-through issue was requested by DOC, and what assertions were made by Canada/the respondents and what factual information/evidence was provided by them, in the DOC's preliminary investigation? Please provide copies of the relevant documents, or if already submitted, citations to the relevant exhibits in this dispute.**

Answer:

76. As detailed in response to question 7 to the United States, in an aggregate case, the Commerce Department determines the total amount of the subsidy to producers of the subject merchandise and allocates that amount over all sales of the subject merchandise. Thus, when all of the alleged recipients of the financial contribution and the benefits are producers of the subject merchandise, no further analysis is required to perform the aggregate calculation. Benefits that potentially shift from one producer to another in an arm's-length transaction would still be part of the overall numerator (either remaining with the original recipient or "traveling to" the purchaser), as long as both companies produce subject merchandise. Therefore, for two of the three categories that Canada claims a pass-through analysis was necessary – logs harvested by one sawmill and then sold to another, and lumber sold to remanufacturers – the question of pass-through is moot in an aggregate context. As a result, the Commerce Department did not request any information on these types of transactions. The precise amount of the benefit received by individual producers (for example, whether the benefit stayed with the

[81] *See, e.g.*, China Protocol §§ 2(B)(3), 3, 5.2, 8.2, 11.4.

original recipient or "traveled to" the purchaser) would only be determined in a company-specific review.

77. For the one remaining category where Canada claims a pass-through analysis is necessary – independent loggers selling to sawmills – the Commerce Department asked specific questions about the volume and value of logs sold domestically at arm's-length prices.[82] The provinces' responses are provided below.

78. Quebec: In its questionnaire response, Quebec indicated that there were essentially no arm's-length transactions involving Crown timber sold by independent loggers to sawmills.[83]

79. Ontario: In its questionnaire response, Ontario suggested that 30 percent of Crown timber was sold in arm's-length transactions. However, tenure holders who do not own a sawmill are limited with respect to where such harvested timber can be sold because they must sign "wood supply agreements" whereby they agree to supply specific quantities of wood to specific mills.[84] Thus, far from constituting arm's-length transactions, such sales are largely circumscribed by the province.[85] In addition, the independent forestry research study that Ontario submitted as evidence of private prices indicated that log swapping was common among large tenure holders.[86]

80. Alberta: Alberta's questionnaire response suggested that only a small portion of the harvest was characterized by arm's-length transactions. In 1998 and 1999, only 2 percent was characterized as arm's length; this portion increased to six percent in 2000.[87]

81. British Columbia: In its questionnaire response, B.C. suggested that as much as 30 percent of Crown timber was sold in arm's-length transactions. As with Ontario, however, this figure is misleading. First, as described in response to question 1 to the United States, B.C. stated that for the most part, loggers operate as employees or contractors for tenure holders.

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[82] *See* Exhibit U.S.-30, pages 49-51.

[83] GOQ June 28 Response, at GOQ - Log Export Restrictions Narrative and Exhibits 1-12, page 8 ("Because TSFMA holders are allocated a volume of timber from the public forest for the express purpose of supplying their wood to processing mills, there is little interest in exporting or selling timber rather than processing it.") (Exhibit U.S.-36).

[84] GOO June 28 Response, at Section 26 Generic Version, page 4, section 3.0 (Exhibit U.S.-23).

[85] *See also* the United States' response to question 8 to Canada.

[86] Letter from Hogan & Hartson to Department of Commerce (July 30, 2001) (Exhibit U.S.-32).

[87] GOA June 28 Response, at vol. 1, page AB-X-15 (Exhibit U.S.-36).

Moreover, domestic processing requirements, minimum cut requirements and mill ownership requirements serve to narrow the range of purchasers available to any harvester of Crown timber who is not a mill owner. Second, as in Ontario, there is evidence suggesting that log swapping is a major part of the so-called arm's-length transactions. B.C.'s questionnaire response indicates that with respect to the 30 percent referred to above, "[i]n fact, fully half of the Coastal log harvest is exchanged between companies."[88] B.C. also stated:

> Despite provincial processing requirements, companies engage in considerable inter-company trading. Some of this informal trading may preclude the highest return for the fibre. The existing log market may not fully meet the criteria for an open and competitive log market.[89]

82. Thus, as explained above and in our response to questions 1 and 6 to the United States, it is clear from the record that the combination of domestic processing requirements, minimum cut requirements and mill ownership requirements combine to ensure that the great majority of Crown timber is force-fed to tenure-holding lumber producers. As such, the evidence does not support Canada's claim that a pass-through analysis is necessary or appropriate.

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[88] B.C. June 28 Response, at vol. 5, Exhibit BC- S-9, page 47 (Exhibit U.S.-36).

[89] *Id.* (Exhibit U.S.-36).

Questions to Canada

**5. According to Canada is a Member always obliged to determine benefit using as a benchmark market prices from the country under investigation? Please respond in this regard to the arguments of the United States and the EC as to the problems with using an in-country benchmark in the situation where there are no market based prices, say for example in the case of a government monopoly over the supply of a good?**

Answer:

83. A Member is not always obliged to determine the benefit using as a benchmark market prices from the country under investigation. This is confirmed by numerous references in WTO agreements[90] and prior WTO decisions.[91]

84. The United States also notes that the Panel's example, based on the argument of the EC, of the case of a government monopoly over the supply of a good (e.g., where the government controls 100 percent of a market) is no different in principle from the circumstances of the instant case, where the provincial governments control 85 to 95 percent of the market for timber. After all, the same would apply if the government controlled 99 percent or 98 percent or 97 percent, etc. If it is shown based on the facts and economics that the predominance of the government supply significantly distorts the market, the appropriate commercial benchmark can be found outside the country, so long as a reasonable effort is made to measure the commercial benefit provided in the country under investigation.

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[90] *See, e.g.*, Item (d) of the Illustrative List at Annex I of the SCM Agreement.

[91] *See, e.g., Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, Report of the Panel, as modified by the Appellate Body, adopted 27 October 1999, para. 7.47. *See also* EC Third Party Submission, paras. 18-19.

**8. In paragraph 54 of its first written submission, Canada states that a "significant portion" of harvesting is done by entities operating at arms'-length from lumber producers. Please specify approximately what percentage this "significant portion" represents. What, in the context of this statement, does Canada mean by "arms'-length" prices?**

Answer:

85. As discussed above in response to question 1 to the United States, the facts demonstrate that the vast majority of Crown timber is provided directly to lumber mills. Moreover, the facts demonstrate that the provincial stumpage systems essentially preclude truly arm's-length transactions.

86. *Black's Law Dictionary* defines the term "arm's-length transaction" to mean "a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a *fair market value* determination."[92] The term "fair market value" is, in turn, defined as "the amount at which property would change hands between a willing buyer and a willing seller, *neither being under any compulsion to buy or sell* and both having reasonable knowledge of the relevant facts."[93] Thus, a truly arm's-length negotiation is one where neither party is under any outside control or influence, either from the party with whom they are bargaining, or other parties.[94]

87. Given the ordinary meaning of "arm's-length," a so-called independent logger should only be viewed as operating at "arm's-length" from lumber producers if the harvester is freely negotiating, under no outside control or influence and under no compulsion to sell. As discussed above, the record establishes that not only are there very few transactions by independent harvesters, but even in such transactions, the provincial governments impose numerous restrictions and requirements on the transactions. All of the provinces generally

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[92] *Black's Law Dictionary* 100 (5th ed. 1979) (emphasis added) (Exhibit U.S.-34).

[93] *Id.* at 537 (emphasis added) (Exhibit U.S.-34). This is consistent with the "arm's length" concept under Canadian law as well, which recognizes that certain transactions between unrelated persons may nevertheless be non arm's-length transactions "depending on all the circumstances." *See* IT-419R, Providing the Meaning of Arm's Length: Section 251 and 252 of the Income Tax Act (August 24, 1995) (Exhibit U.S.-35). Under Canadian law, "failure to carry out a transaction at fair market value may be indicative of a non-arm's length transaction." *Id.* Canadian law notes that "the key factor is whether there are separate economic interests which reflect ordinary commercial dealing between parties acting in their separate interests." *Id.*

[94] The notion that "arm's length" transactions involve transactions between parties acting free from outside influences is supported by the language of footnote 59 of the SCM, which recognizes that, for tax purposes, the concept of "arm's length" transactions refers to "transactions between *independent* enterprises . . . ." (emphasis added).

require that Crown timber is processed in a mill within the province. Moreover, each province has additional restrictions that impede a harvester's ability to negotiate freely and compel the harvester to sell to particular customers. For example, in Ontario tenure holders are required to sign "wood supply agreements," in which they agree to supply specific quantities of wood to specific mills.[95] In fact, the evidence shows that loggers often operate as employees or contractors for tenure holders.[96] In light of this evidence, the only reasonable conclusion is that there are no true arm's-length transactions for Crown timber.

**10. What in Canada's view is the relevance of determinations made by the DOC in previous cases which pre-date the UR Agreement (e.g., the citation in Canada's submission to the benchmark used by the DOC in Lumber III?**

Answer:

88. It is the view of the United States that past determinations by the Commerce Department, which apply U.S. law on the basis of different factual records, are of no relevance in determining whether the United States has acted consistently with its obligations under the SCM Agreement in the present case. That is particularly true where, as here, the prior determinations at issue were decided under a different domestic legal standard, as well as different international obligations.

89. As explained in the Preliminary Determination, at the time of the *Lumber III* determination cited by Canada, under U.S. law the government provision of a good was deemed to provide a benefit if the good "was provided at preferential rates."[97] That standard is fundamentally different than the current "adequate remuneration" standard and therefore the issue of an appropriate benchmark was fundamentally different as well. As the Commerce Department explained in *Lumber III*:

> the most common test of which the Department has applied in determining preferentiality is whether the government . . . is providing a good or service at a price that is *lower than the prices the government* charges to the same or other users of that product *within the same political jurisdiction*.[98]

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[95] GOO June 28 Response, at Section 26 Generic Version, page 4, section 3.0 (Exhibit U.S.-23).

[96] See footnote 12 and accompanying text.

[97] *Preliminary Determination*, 66 Fed. Reg. at 43196 (Exhibit CDA-1). The old GATT Subsidies Code did not contain any rules on the determination of benefit.

[98] *Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22570, 22590 (May 28, 1992) (emphasis added) ("*Lumber III* Final") (Exhibit CDA-24).

It was the principle that preferential pricing should be based on the government's pricing behavior within the same political jurisdiction that formed the basis for the Commerce Department's decision to reject the petitioners' argument for a cross-border comparison in *Lumber III*, not comparability concerns. Canada's claim that the decision was based on a lack of comparability of prices across borders is simply false. In fact, the Commerce Department did not dismiss cross-border comparisons *per se*, but rather based its decision on the lack of a justification for doing so based on the specific record of that case. Specifically, the Commerce Department stated that:

> in the absence of clear and persuasive evidence that comparisons within the same jurisdiction would somehow yield skewed results, the Department will not stray from its methodological preference. We do not find that the Coalition has presented such clear and persuasive evidence.[99]

The real justification for the rejection of cross-border prices was the fact that the Commerce Department had "sufficient and reliable nonpreferential price data" from within Canada.[100] Other factors, such as comparability, were therefore moot and were simply noted in passing to underscore the Commerce Department's primary rationale.

90. In sum, a full and fair reading of the *Lumber III* decision should erase any lingering doubt that it is of no relevance to this proceeding.

**14. Concerning the issue of country-wide and aggregate duty calculations:**

**(b) Did the sales from the Maritime provinces in this case benefit from any support programs, provincial or federal?**

Answer:

91. The Commerce Department did not investigate and, therefore, did not conclude that the Maritime Provinces received no support or that lumber sales from the Maritime Provinces were not subsidized.[101] However, the unique situation in the Maritime Provinces has been recognized throughout the lumber dispute, by both the U.S. industry and the Government of Canada. Specifically, there is a small amount of lumber production from the Maritime provinces and,

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[99] *Id.* at 22592.

[100] *Id.*

[101] *See Amendment to Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada* , 66 Fed. Reg. 40228 (August 2, 2001) (Exhibit U.S.-4).

unlike the other Canadian provinces, a large majority of total timber in the Maritimes is sold from private lands.

**(e) Could Canada explain what it means by "country-wide basis" and why (i.e., on the basis of what provisions in the SCM Agreement or any other Agreement) it considers that a countervailing duty assessed on an aggregate basis must be on a country-wide basis.**

Answer:

92. Nothing in the SCM Agreement addresses the calculation of a "country-wide rate." The "country-wide rate" at issue is a creature of U.S. law, not the WTO. Under current U.S. law, a country-wide rate is calculated only in an aggregate case. The calculation of the country-wide rate is based on the total amount of the subsidy found to exist with respect to the *subject merchandise*, allocated across all sales of the *subject merchandise*. Nothing in U.S. law or practice requires that non-subject merchandise be included in a country-wide rate calculation.

93. Canada is simply incorrect when it claims that the scope of the underlying investigation is all softwood lumber from Canada. The scope of the investigation is *"certain"* softwood lumber from Canada. As is evident from the description of the scope of the investigation, there are numerous softwood lumber products that are excluded from the scope of the investigation, i.e., they are not subject merchandise.[102] Maritime lumber is one of those excluded products and was treated exactly like other excluded merchandise. None of the excluded products were included in the country-wide rate calculation and none of the excluded products, including Maritime lumber, is subject to countervailing measures.

[102] *Preliminary Determination*, 66 Fed. Reg. at 43186-88 (Exhibit CDA-1).

## EXHIBIT LIST

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| U.S.-17 | Questionnaire Response of the Government of British Columbia (June 28, 2001) |
| U.S.-18 | Small Business Forest Enterprise Regulation §§ 4, 4.1, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-71 |
| U.S.-19 | Application and Tender for Timber Sale License (Section 21) para. 8, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-60 |
| U.S.-20 | B.C. Ministry of Forests, Forest Policy Manual § 14.1, contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-70 |
| U.S.-21 | Sample Timber License § 1.01(a), contained in B.C. June 28 Response, at vol. 7, Exhibit BC-S-66 |
| U.S.-22 | Questionnaire Response of the Government of Quebec (June 28, 2001) |
| U.S.-23 | Questionnaire Response of the Government of Ontario (June 28, 2001) |
| U.S.-24 | Questionnaire Response of the Government of Alberta (June 28, 2001) |
| U.S.-25 | Questionnaire Response of the Government of Saskatchewan (June 28, 2001) |
| U.S.-26 | Questionnaire Response of the Government of Manitoba (June 28, 2001) and Supplemental Questionnaire Response of the Government of Manitoba (August 3, 2001) |
| U.S.-27 | Preliminary Calculation Worksheets |
| U.S.-28 | Sample Calculation |
| U.S.-29 | Questionnaire Response of the Government of Newfoundland (June 28, 2001); Questionnaire Response of the Government of New Brunswick (June 28, 2001); Questionnaire Response of the Government of Nova Scotia (June 28, 2001) |
| U.S.-30 | Commerce Department Questionnaire (May 1, 2001) |
| U.S.-31 | Quebec Private Study |
| U.S.-32 | Letter from Hogan & Hartson to Department of Commerce (July 30, 2001) |
| U.S.-33 | Luc Parent, "A Financial Strategy for the Development of Private Timber Lands in Quebec" (translated) (June 1995), contained in Petition, Exhibit IV G-6; Rejean Soleil, "Wood Producers in Bad Mood" Le Soleil (translated) (April 13, 2000), |

contained in Petition, Exhibit IV I-2; Loæc Hamon, "Stumpage Rate Increase, Federation Begs the Minister to Stand Tall" La Terre de Chez Nous (translated) (March 16, 2000), contained in Petition, Exhibit IV I-2; Letter from the Grand Council of the Crees (April 13, 2000), contained in Petition, Exhibit IV H-6

U.S.-34 *Black's Law Dictionary* 1182, 577 (7th ed. 1999); *Black's Law Dictionary* 100, 537 (5th ed. 1979)

U.S.-35 IT-419R, Providing the Meaning of Arm's Length: Section 251 and 252 of the Income Tax Act (August 24, 1995)

U.S.-36 GOA June 28 Response, at vol. 1, page AB-X-15; B.C. June 28 Response, at vol. 15, page BC-LER-45; B.C. June 28 Response, at vol. 5, Exhibit BC-S-9, page 47; GOQ June 28 Response, at GOQ - Log Export Restrictions Narrative and Exhibits 1-12, page 8